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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 941

THOMAS B. WHEELER, *Petitioner*

v.

LOUISIANA STATE BAR ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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LOUISIANA STATE BAR ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioner, an attorney practicing in State and Federal courts, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court, disbarring petitioner from practice of law in that State entered on October 3, 1962, rehearing denied November 5, 1962.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court as reported at 243 La. 618, 145 So. 2d 774 (1962) is appended (App. pp. 1a-19a). No opinion was written on rehearing.

JURISDICTION

The judgment of the Louisiana Supreme Court was made and entered October 3, 1962; rehearing denied November 5, 1962 (App. p. 12). The jurisdiction of this court is invoked under Title 28, U. S. Code, section 1257 (3). By order of February 4, 1963, the time for filing this petition was enlarged to March 1, 1963.

QUESTIONS PRESENTED

(1) Where an attorney with unblemished record for 20 years retained funds in dispute with other attorneys involving mutual accounting, and no intent to defraud or dishonesty is shown, is permanent disbarment within the constitutional range of due process?

(2) Does the assignment of the burden of proof to an attorney charged with misconduct in a disbarment proceeding violate the due process clause of the Fourteenth Amendment to the Constitution?

(3) Where Rules of Court allow either party to a disbarment proceeding 20 days to file exceptions to report of a Commissioner, failing which the report stands confirmed, is petitioner denied due process and equal protection where the Court ordered disbarment on exceptions filed late, and without leave, to a report recommending no disbarment but only a two-year suspension?

STATUTES AND RULES INVOLVED

Pertinent portions of Rule XVI, Rules of Supreme Court of Louisiana and Article XIII, Section 9, Articles of Incorporation of the Louisiana State Bar Association are set forth in the Appendix at page 20a.

STATEMENT

Petitioner in Louisiana had been representing Chicago lawyers in collecting certain claims in admiralty. His fees were contingent, comprising a part of each collection. Some payments were made to him; others to the Chicago firm directly, payments in which he had an interest. It appears that some bitterness arose out of claims for mutual accounting.

In addition to the filing of a civil suit, the Chicago attorneys made complaint to the Louisiana Bar Association, which petitioned the State Supreme Court for disbarment. While the mutual accounts were adjusted and all differences composed in the civil suit, the Bar Association pressed on for disbarment.

The Commissioner appointed by the Court, after hearing the parties, concluded that petitioner had failed to account and had commingled and converted certain funds to his own use. He recommended suspension for two years.

While the applicable Rules of the State Supreme Court allow 20 days for filing exceptions, the Bar Association took no action for approximately 40 days; then, without excuse or leave of court, the Bar Association filed exceptions asking disbarment rather than suspension.

Upon hearing, the State Court overruled petitioner's objections to the late exceptions, and, by split decision, ordered him permanently disbarred. Rehearing was denied, and stay of mandate pending a petition to this Court for certiorari was summarily refused November 12, 1962, with the statement, "no Federal question involved".

REASONS FOR GRANTING THE WRIT

I. Permanent Disbarment Exceeds the Bounds of Fair Discretion

In ordering permanent disbarment, the State Court has stripped petitioner of his profession after some 20 years of respected practice. No fraudulent or dishonest motive was alleged; no moral turpitude was claimed.

The findings below are that (1) the petitioner failed "to timely process, settle, account for, report and surrender several hundred files" forwarded to him by the complaining attorneys; (2) he commingled with his own, converted to his own use, funds received for the account of the forwarding attorneys and their client companies.

The Louisiana Court has itself thoroughly recognized that the purpose of disbarment is to protect the public and the courts, and no greater penalty should be imposed than is necessary to accomplish this purpose. *In re Craven*, 204 La. 486, 15 So. 2d 861 (1943); *In re Novo*, 200 La. 833, 9 So. 2d 201 (1942). Such was the basis for dissent below by Sanders, J., in the case at bar. (App. 18a)

Such, apparently, was the *ratio decidendi* of this Court in *Sacher* v. *Association of the Bar of the City of New York*, 347 U.S. 388 (1954). For this sole question certiorari was granted, 346 U.S. 894 (1953): Under the circumstances, "does permanent disbarment exceed the bounds of fair discretion * * *?" The answer here, as there, would seem to be in the affirmative.

Thus, where a reprimand would be sufficient, a decree of disbarment was reversed. *In re Patterson*, 176 F. 2d 966 (C.A. 9, 1949). All courts appear to recognize that limits on the power to disbar are coterminous with the necessity to protect the public and the

courts. *Bradley* v. *Fisher*, 13 Wall. (U.S.) 335 (1872); *In re Doe*, 95 F. 2d 386 (C.A. 2, 1938); *In re Patterson*, 176 F. 2d 966 (C.A. 9, 1949). It must be exercised with restraint and caution, and only when the attorney is utterly unfit to be an officer of the court. *In re Sizer*, 306 Mo. 356, 267 S.W. 922 (1924).

Even in this Court, an attorney cannot be disbarred but by majority of the Justices participating. Rule 8, U. S. Supreme Court. Of such moment and importance is the right to practice.

While the decision below was by the State Court, the effect upon petitioner's status in federal courts is plain and direct. *In re Isserman*, 345 U.S. 286 (1958); *In re Spears*, 185 F. 2d 456 (C.A. 6, 1950), *cert. den.* 341 U.S. 910 (1951); See Rule 8, *supra*, of this Court.

Petitioner's Brief below asserted rights under due process and equal protection clauses of the United States Constitution, though not in exactly the same terms presented here.[1] The State Court did not discuss this claim, though it did deny a stay of mandate on the ground that "no Federal question [is] involved" (App. pp. 19a-20a).

The right to practice law is fully within the protection of the due process clauses of the federal Constitution. *Randall* v. *Brigham*, 7 Wall. (U.S.) 523 (1869); *Ex parte Garland*, 4 Wall. (U.S.) 333 (1867); *Bradley* v. *Fisher*, *supra*; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

1/ "Moreover, petitioner has been and will be deprived of due process of law and the equal protection of the law guaranteed him by both the United States and Louisiana Constitutions if he is suspended from the exercise of his valuable property right to practice law in a proceeding based solely and exclusively on his disbarment, and not seeking his suspension from practice." Brief, pp. 14-15.

(a) The Decision Below Is Unwarranted by the Facts

In the *Schware Case* it was fully recognized that the practice of law is a matter of constitutional right, protected by due process and equal protection, and not a matter of grace by the states.

Likewise this Court has recognized that the power to regulate must be exercised without caprice or arbitrariness, to preserve the "rights and independence of the bar" as well as the dignity of the Court itself. *Ex parte Secombe,* 19 How. (U.S.) 9, 13 (1857). So, in reversing a decree of disbarment the Seventh Circuit announced a sound and sensible standard: *In re Fisher,* 179 F. 2d 361 (C.A. 7, 1950) *cert. den.* sub nom. *Kerner v. Fisher,* 340 U.S. 825 (1951), the Court said (p. 369):

> "The legal calling is a time-honored profession and the Courts owe a duty to protect the public from impositions and improper practices * * *. Such duty, and the manner in which it is exercised, must not be despotic, but the charges must be sustained by clear and convincing proof and *the misconduct must be shown to have been fraudulent and the results of improper motives, and the proof must show intent.*" (Italics supplied)

In refusing to sanction disbarment in the federal courts following such action by the Supreme Court of Louisiana, this Court in *Theard v. United States,* 354 U.S. 278 (1957), followed and applied the long-standing rule in *Selling v. Radford,* 243 U.S. 46, at p. 51 (1917), in acknowledging "the duty was not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

The case at bar appears to present imposition of the extreme penalty for a non-criminal, even good faith,

dereliction. The very worst shown by the record is that petitioner failed to handle his work promptly; did not keep the forwarding attorneys informed, nor did he account properly for funds received for their account; moreover he commingled their funds with his own and converted them to his own use.

No suggestion is made that petitioner acted with dishonest motive nor intent to defraud. On the contrary, petitioner at all times felt he was within his rights in demanding an accounting from the forwarding attorneys as to funds collected by them in which he had an interest.[2] However erroneous this view may have been, it has everywhere been recognized that mere retention of a client's money, in the absence of intent to defraud or dishonesty, is not ground for disbarment. *Bonner* v. *Goodloe*, 205 Ky. 555, 266 S.W. 62 (1924); *Duffin* v. *Commonwealth*, 208 Ky. 452, 271 S.W. 555 (1925); *In re Duncan*, 64 So. Car. 461, 42 S.E. 433 (1902). *In re Lentz*, 65 N.J.L. 134, 46 Atl. 134 (1900); *In re Fisher*, supra.

Such conduct as charged here occurs in every case where an attorney in good faith asserts his common law lien on funds and property coming into his possession. *Lyman* v. *Campbell*, 182 F. 2d 700 (C.A., D.C., 1950). Nothing in this record shows more than this, and certainly neither fraud nor dishonesty is imputed.

As a matter of fact, the State Court recognized that the claim for money had been fully satisfied before the decree of disbarment was entered (footnote 6 to Opinion below, App. p. 7a).

While the Louisiana Court expressly recognized the non-punitive nature of disbarment, it made no finding

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[2] 145 So. 2d 778, 784.

of any fraudulent intent or dishonest motive. No facts were recorded to indicate that in 20 years at the bar, petitioner had more than this one complaint filed by this single client. And the whole affair could be classed as a controversy between attorneys involving mutual accounts.

On this basis, to strip a lawyer of his means of livelihood, to stigmatize his character, seems unnecessarily severe, and therefore a denial of due process. *Sacher* v. *Association of the Bar*, 347 U.S. 388 (1954); *In re Patterson*, 176 F. 2d 966 (C.A. 9, 1949).

In this sense it was said by Mr. Justice Field for this Court in *Bradley* v. *Fisher*, 13 Wall. (U.S.) 335 (1872):

> (p. 355) "To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. *A removal from the Bar should, therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.*" (Italics supplied).

In the case at bar, the State Court made no finding of dishonesty or fraud; it did not find the petitioner to be a threat to the proper administration of justice, nor his continuance at the bar incompatible with respect for the court, or regard for integrity of the profession. Lacking all such prerequisites, the Louisiana Supreme Court nonetheless ordered disbarment, asserting its authority "to determine under the broad discretion vested in it what action, if any, is to be taken against an attorney charged with misconduct and unethical dealings in the discharge of his professional responsibilities."

Decisions of this Court clearly show that this "broad discretion" is not without limit under the due process clause, but must bear a reasonable relation to the public interest which requires protection. If the penalty be "unnecessarily severe", then due process requires its modification, as in the *Sacher Case, supra.*

II. An Attorney Cannot Be Deprived of the Right to Practice Law Except By Due Process of Law, Which Requires Observance of Rules of Court

Substantial questions of federal constitutional rights are put in issue by this case. The Rules of Court with respect to disbarment proceedings in Louisiana have been well settled for a period of nearly 30 years. *In re Kenner*, 178 La. 774, 152 So. 520 (1934). Notwithstanding this fact the Louisiana Supreme Court has seen fit to vary their application to this petitioner to his prejudice.

The Constitution of the State of Louisiana in Article VII, Section 10, grants to the Louisiana Supreme Court "original jurisdictional in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the Court." Rule XVI of the Rules of the Supreme Court of Louisiana provides that disbarment proceedings shall be governed by Article XIII of the Articles of Incorporation of the Louisiana State Bar Association. Section 7 of Article XIII provides the court may, after joinder of issue, appoint a commissioner to hear the evidence. Section 9 of the same Article prescribes the procedure subsequent to the filing of the commissioner's report in terms as follows:

> "Upon the termination of the hearing, the commissioner shall report to the Supreme Court his

findings of fact and conclusions of law. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are, within that period, filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the Court on the summary docket, and on the record prepared before the commissioner."

The most notable variation of the rules occurred when the respondent committee was allowed to file its exception to the Commissioner's Report 20 days after the time for such filing was closed. This was allowed without excuse or cause, and without prior leave of court. Petitioner's objection to this procedure was summarily overruled. This was clearly error in a material and prejudicial respect.

The long-standing interpretation of the procedural rule here involved is found in the case of *In re Kenner, supra*, where the court said (152 So. at p. 525).

> "* * * the court would view the failure to except or object [to the Commissioner's Report] as a confession by the party cast that the findings and recommendation are correct and would then pronounce its own judgment *in accordance with the findings and recommendations.*" (Italics supplied).

This view has been explicitly confirmed in *Louisiana State Bar Association* v. *Woods*, 243 La. 94, 141 So. 2d 828 (1962), where the court held the findings of fact and conclusions of law became final as to a party who did not file timely exceptions. Accord, *Louisiana State Bar Association* v. *Yoder*, 148 So. 2d 597 (Jan. 14, 1963).

It is well accepted that the Rules of Court have the force of law, binding upon the court as well as litigants. *Weil* v. *Neary*, 278 U.S. 160 (1928); *State ex rel Langenstein* v. *City of New Orleans*, 228 La. 939, 84 So. 2d 467 (1955).

The right of petitioner to have his case litigated in accordance with established rules and principles is well expressed by the Louisiana Supreme Court in *Dupuy* v. *Tedora*, 204 La. 560, 15 So. 2d 886, 890 (1943). Frankfurter, J., announced a sound approach for application here, in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956):

> (p. 213) "Procedural and jurisdictional limitations on judicial actions by the federal courts are not playthings of lawyers nor obstructions on the road of justice. Whether formulated by the Constitution, congressional enactments, or settled judicial precedents, they are means designated to keep the courts within appropriate limits and to enforce (214) rights according to general standards and not have them depend on the impact of the individual case."

The court denied petitioner's legal rights when it permitted respondent to file exceptions to the Commissioner's Report 20 days after the time allowed therefor. The court heard the case on respondent's late exceptions and then disbarred petitioner, though the Commissioner had found no cause therefore and recommended only suspension.

III. The Burden of Proof Was Improperly Shifted to Petitioner

In a disciplinary proceeding under Louisiana practice the Bar Association brings the charges and has the burden to sustain them by lawful evidence. *In re Fallon*, 204 La. 955, 16 So. 2d 532 (1943); *In re Reed*, 203 La. 1008, 14 So. 2d 818 (1943). In this case the Supreme Court of Louisiana shifted the burden to the petitioner to establish his innocence.

Specification 2 of the charges against the petitioner relates to the alleged commingling and conversion of client's funds. In its consideration of the proof of this charge the court's entire discussion was keyed to the weakness of petitioner's defense. At one point the court, in a footnote to its discussion, 145 So. 2d, at page 783 (App. p. 17a), expressly stated:

> "Respondent produced not one single witness to corroborate his stand in this respect, * * *, and as improbable as his stand was, *it was his burden to establish it by clear and convincing evidence and testimony*, which he totally failed to do." (Italics supplied).

The court's entire discussion shows it was up to petitioner to establish his innocence.

Improper assignment of the burden of proof clearly raises a question of due process of law under the federal Constitution. *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639 (1929).

SUMMARY

This is not a case where the trusting layman was imposed upon by an attorney but a dispute between attorneys, where each was indebted to the other. At the time of judgment all money claims against petitioner had been fully satisfied, and a civil suit for that purpose fully settled.

As to the finding of commingling and conversion, petitioner received the funds in commingled condition; part was his as his fee.

Whatever the merits, it is abundantly clear that there is no danger to the administration of justice from petitioner's continuation at the bar; there is no threat to the court's dignity nor to the respect due the profession. In his 20 years at the bar, only one client has ever complained of his conduct, and however he may have erred, petitioner honestly believed in good faith that he was within his lawful rights.

CONCLUSION

The Supreme Court should grant certiorari for the purpose of establishing that disbarment by a State Court does involve federal rights under the Constitution, and that proceedings for such purpose must conform to basic standards of due process in both procedure and result.

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APPENDIX

LOUISIANA STATE BAR ASSOCIATION

v.

THOMAS B. WHEELER.

No. 45533.

Supreme Court of Louisiana.

Oct. 8, 1962.

Rehearing Denied Nov. 5, 1962.

Disbarment proceedings. The Supreme Court, Fournet, C. J., held that upon attorney being found guilty of charges reflecting gross professional misconduct and involving conversion to his own use of sizable amount of money belonging to forwarding law firm, name of attorney must be stricken from roll of attorneys and his license to practice in state must be cancelled.

Order accordingly.

Sanders, J., dissenting in part.

John Pat. Little, Chairman, Trial Council, New Orleans, Bascom D. Talley, Jr., Vice-Chairman, Bogalusa, Pat W. Browne, Sr., New Orleans, A. K. Goff, Jr., Ruston, Walter G. Arnette, Jennings, for Committee on Professional Ethics and Grievances, Louisiana State Bar Association.

James J. Morrison, Leonard A. Calcagno, New Orleans, for respondent.

FOURNET, Chief Justice.

This court's Committee on Professional Ethics and Grievances, upon the complaint of the firm of Heineke, Conklin, and Schrader of Chicago, Illinois, contained in a letter dated April 20, 1960, instituted this proceeding against Thomas B. Wheeler, an attorney practicing in New

Orleans, under the original jurisdiction vested in us by Section 10 of Article VII of the Louisiana Constitution of 1921, seeking his disbarment on charges of professional and ethical misconduct.

The petition, predicated on two specifications drawn by the committee following a full hearing, charges, briefly, that (1) the respondent, despite repeated demands, failed and refused to discharge his professional and legal duty to timely process, settle, account for, report and surrender several hundred files forwarded to him under an agreement between them, and arising out of claims for damages to ocean marine cargo covered by policies underwritten through companies represented by the Illinois firm, referred to as The Atlantic Companies,[1] and (2) violated his obligations and responsibilities in his fiduciary capacity as an attorney by commingling with his own, and converting to his own use, funds received by him for the account of the Illinois firm and its client companies.

After issue was joined by the respondent filing what is, in effect, a general denial, the matter was heard by the Honorable A. J. Waechter, Jr., an attorney of New Orleans, who was the Commissioner appointed by this court to take the evidence and report his findings of fact and conclusions of law in accordance with the procedure set out in the rules adopted by this court pursuant to our constitutional authority in such matters.[2]

In a carefully prepared report, filed with the court on November 27, 1961, wherein he succinctly states and an-

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[1] These are the Atlantic Mutual Insurance Company and the Centennial Insurance Company.

[2] See, Section 10 of Article VII of the Louisiana Constitution of 1921, and pages 377-389 of Volume 21 of the Louisiana Revised Statutes, together with appropriate supplements thereto, particularly Section 9 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association.

alyzes the charges and defenses in the light of all of the evidence, Mr. Waechter concluded the committee had established "without question" that the respondent was guilty of the charges against him, with the exception of that portion of Specification No. 1 alleging he had exceeded his authority with reference to the settlement of claims. He, nevertheless, recommended that the respondent be suspended from the practice of law in this state for a period of two years from the date of a final decree in this matter.

On December 18, 1961, the respondent objected to this report on sixteen counts, two of which are exceptions of no cause and no right of action, the remainder touching on the merits. On January 9, 1962, the committee excepted to that portion of the report recommending only the suspension of Wheeler. Counsel representing the respondent thereafter countered with a motion seeking to strike the committee's exception and to dismiss the entire proceedings.

This motion and the exceptions of no cause and no right of action rest on counsel's strained and devious effort to restrict this court's jurisdiction in matters affecting disciplinary action against members of the Louisiana State Bar Association through a highly technical interpretation and application of Section 10 of Article VII of the constitution and this court's rules governing such proceedings adopted pursuant to the authority there conferred.

[1] The basis of counsel's contentions and arguments in support of the motion and exceptions stems from the erroneous assumption that (1) inasmuch as the committee's petition only prayed for respondent's disbarment, without seeking his suspension in the alternative, as recommended by the Commissioner, and (2) since the committee failed to timely object to the report, it, as well as this court is, under our rules, bound thereby, and the entire proceeding must be dismissed as moot as there is nothing before this court for review.

Respondent's ingenuous presentation reflects a clear misunderstanding and misinterpretation of our constitutional authority and rules. It hinges in part on the erroneous assumption that this court is powerless to suspend an attorney in such proceedings where the committee has not specifically prayed for the suspension recommended by the commissioner, and in part on a misconception of the effect of the failure of the parties to object to the commissioner's report within the twenty-day period provided in our rules. It also hinges in part upon unwarranted effect sought to be imputed to the recommendation of a commissioner appointed to hear evidence in a disbarment proceeding, and in part upon the total inaccuracy of respondent's frequently reiterated conclusion that a commissioner's recommendation of anything less than disbarment is tantamount to the committee's failure to prove any misconduct warranting disbarment.

Pursuant to the provisions of the Louisiana Constitution of 1921 granting this court "exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as the court may adopt,"[3] we created a Committee on Professional Ethics and Grievances charged with the mandatory duty of (1) investigating all complaints lodged against members of the Bar, and (2) instituting disbarment or suspension proceedings if, after investigation, it finds the conduct complained of warrants such action. Sections 2, 3, and 4 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association.

[2] After such a proceeding has been instituted and issue joined by the filing of an answer by the accused member within fifteen days, "the court may hear the evidence, or the court may appoint a commissioner to take the evidence in chambers." Section 7. If a commissioner is appointed for this purpose, as was done in the instant case, he is

[3] Section 10 of Article VII of the Louisiana Constitution of 1921.

required, upon the termination of the hearing, to "*report to the Supreme Court his findings of fact and conclusions of law.*" Section 9. This section further provides that "The parties *shall have twenty days from the filing of the report to file exceptions thereto*, and if no exceptions are, *within that period*, filed by either party, the report shall stand confirmed." And while it is true that a commissioner customarily appends to his report a recommendation that may be informative, or, conceivably, persuasive, such recommendations are not authorized in our rules of order, and are not, therefore, binding on this court. The emphasis has been supplied.)

This court, in the case of In re Reed, 207 La. 1011, 22 So. 2d 552, aptly observed that no harm had been done by the commissioner's recommendation with respect to the imposition of a penalty since his "report *is prepared and furnished solely for the court's assistance and convenience in determining the issues of the disbarment proceeding, and any recommendations contained therein are not conclusive on the court.* It can and will, in its discretion, either reject or adopt them." See, also, In re Weber, 202 La. 1037, 13 So.2d 341; Louisiana State Bar Association v. Steiner, 204 La. 1073, 16 So.2d 843; and Louisiana State Bar Association v. Woods, La., 141 So.2d 828. (The emphasis has been supplied.)

[3-5] It necessarily follows, therefore, that the commissioner's recommendation of suspension in this case can have no effect whatsoever on its final outcome; and inasmuch as suspension is less than, but implicit in, the more severe disciplinary action of disbarment, it is not mandatory that the committee plead one or the other, or both in the alternative. Regardless of the manner of pleading, or the recommendation of the commissioner, it is the ultimate duty of this court to determine under the broad discretion vested in it what action, if any, is to be taken against an attorney charged with misconduct and unethical dealings in the dis-

charge of his professional responsibilities. See, In re Craven, 204 La. 486, 15 So.2d 861; In re Novo, 200 La. 833, 9 So.2d 201; In re Weber, supra; Louisiana State Bar Association v. Steiner, supra; and In re Reed, supra.

[6, 7] Having reached this conclusion it is obvious the entire basis upon which counsel's argument is predicated falls, as the commissioner in the instant case concluded the committee had proved by clear and convincing evidence all of the charges against Wheeler with the exception noted. Hence it was not necessary for the committee to except to his report unless it intended to object to the finding with respect to this exception, i. e., that Wheeler had exceeded his authority in the settlement of claims. And whether respondent's exception to the report, filed December 18, 1961, was timely[4] is immaterial under the circumstances, for this court, in discharging its responsibility in disbarment proceedings must, of necessity, review the record in order to mete out the proper disciplinary action in the light of the charges, defenses, evidence, and report of the commissioner. That portion of Section 9 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association providing the report "shall stand confirmed" where no exceptions are timely filed, means only that it stands confirmed as to the party or parties failing to except "within" the twenty-day period from its filing. Our right to review the record in such an important matter has never —either by our rules or in our pronouncements in indi-

[4] In the recent case of Louisiana State Bar Association v. Wood, La., 141 So. 2d 828, this court held that the party failing to except to the commissioner's report *within twenty days* after it is lodged in the court, that report, under Section 9 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association, stands confirmed. In the instant case the twentieth day, not counting the day on which the report was filed, fell on a Sunday, and the respondent's objection and exceptions thereto were not lodged with the court until the next day, which was the *twenty-first* day.

vidual cases—been relinquished or surrendered to the commissioner; and the parties, by failing to timely object to his report, cannot thus curtail the duties and responsibilities of this court. A mere perusal of the cases relied on by the respondent[5] will readily disclose they are not appo-

The Commissioner concluded "The evidence establishes *without question* that the respondent was guilty of the failure to faithfully and honestly discharge his professional and legal duty to report, account for and remit the monies collected by him for the account of The Atlantic Companies. The evidence further establishes *without question* that the monies collected by him for the account of his client were commingled with his own funds and used by him for his own purposes. Although during the course of the Commissioner's hearings respondent made restitution of the funds for which he had to that time refused to account or remit,[6] *his testimony demonstrated* that *he* not only *failed to recognize the gravity of his actions* but attempted to exculpate himself by laying the blame on the shoulders of those persons who were damaged by his improper conduct." (The emphasis has been supplied.)

[8, 9] A careful review and study of the record in this case convinces us it clearly supports the Commissioner's conclusion that the committee established the charges

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[5] Handlin v. Dodt, 110 La. 936, 34 So. 881; In re Weber, and Louisiana State Bar Association v. Steiner, both supra.

site from a legal or factual standpoint, and are, therefore, not controlling.

[6] Significantly, respondent paid on May 16, 1961 (after the first of the four hearings before the Commissioner), the sum of $12,492.93, not in an effort to make amends for his illegal and unethical professional conduct as established in the hearings, but in settlement of a civil suit for this exact amount filed against him on April 26, 1961, by the Chicago firm.

against the respondent with the exception noted,[7] and, in so far as pertinent here, his report in support of this conclusion is as follows:

"In July of 1954 respondent agreed with a firm of Chicago attorneys that he would through them represent a

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[7] The first specification charges that Wheeler "on or about July of 1954 • • • did enter into an agreement with the firm of Heineke, Conklin & Schrader, Attorneys for The Atlantic Companies, to represent the said Atlantic Companies in the settlement and processing of claims on ocean marine cargo policies underwritten through them. That the said agreement entered into • • • stipulated the fee, and, subsequently, your authority to settle claims. That from about July of 1954 and to the year 1956 several hundred of such matters were forwarded to you for handling. That subsequently: 1.) You failed and refused to render to your client, or to your client's counsel, a statement of status of the various claims; and this, in spite of repeated demands; 2.) That upon demands by the client, through its counsel, to release the matters being handled by you, you did fail and refuse to release the said matters; 3.) That you did issue your check dated January 14, 1960, in the amount of $3,743.75 payable to the order of Heineke, Conklin & Schrader, in part payment of the accounting due them on behalf of their client, The Atlantic Companies; that the said check was returned by the drawee bank, N. S. F.; 4.) That by your own admission under date of June 23, 1960, or some six years subsequent to the entering into the agreement, you were then at that time indebted to the said client, through their counsel, to the extent of some $11,782.00 for monies collected by you as attorney for the client's account, subject to a payment in the amount of $2,250.00, and certain advanced costs and unpaid fees; 5.) That you to this date fail and refuse to render a proper and adequate accounting, or to remit the funds collected by you, to the said counsel for the client. 6.) That you repeatedly violated your authority in reference to the settlement of your client's claims." The second specification charges that Wheeler, in his fiduciary capacity as attorney "received sums of money for the account of your client and that you commingled these funds with your personal funds; that you violated your obligations and responsibilities as a fiduciary by converting funds belonging to your client to your personal use."

group of marine cargo underwriters (The Atlantic Companies) and would undertake to collect on a contingent fee basis claims for damage to ocean marine cargo against the ships and their owners on which the cargo was damaged while being transported. In accordance with this agreement, between July 1954 and the end of 1956 the Chicago firm forwarded to the respondent for handling a large number of cargo claims (approximately eight to nine hundred individual cargo claim files).

"By letter dated January 17, 1957, the Chicago firm sent to the respondent a list covering approximately seventy-five per cent of the cargo claims which had theretofore been forwarded to him, and requested him to review the files and give them a status report. Having failed to receive a satisfactory answer from the respondent, the Chicago attorneys by letter dated March 27, 1957, forwarded a second list to the respondent wherein they set forth file numbers and dates of correspondence authorizing settlements, and requested respondent to forward any funds representing settlements made by him. There followed numerous written and telephone requests for a report on the status of the outstanding claims and for a remittance of collected funds. Finally, being unable to secure any satisfaction, by letter dated December 17, 1958, the Chicago firm wrote the respondent reviewing the history of their relationship, attaching a list of those claims believed to have been compromised but on which remittance had not been made, and directing the respondent to turn over all unfinished matters to a New Orleans law firm for further handling. Respondent did not comply with these instructions until after many months of repeated written and oral demands by both the Chicago and New Orleans attorneys. Finally, in October of 1959, the respondent delivered to the

New Orleans attorneys a number of files which were in suit or which had not yet been finally settled or closed.[8]

"Repeated additional demands by the Chicago firm resulted in securing from the respondent by letter dated December 19, 1959, the return of one hundred and eleven files with a list showing the numbers of the files forwarded on which recoveries had been made and the amounts of the recoveries, which totalled $4,991.66.[9] Respondent acknowledged that after deducting his fee, the client and the Chicago attorneys were entitled to $4,159.72, and suggested that he would remit upon 'our final accounting.' The Chicago firm immediately demanded payment of the amount admitted to be due on the files returned to them. Respondent forwarded his check, dated January 14, 1960, drawn on The Whitney National Bank of New Orleans to the order of the Chicago firm, in the amount of $3,743.75, which was the amount due the client less the respondent's fees and the fees due the Chicago firm. Respondent's check was returned by The Whitney National Bank because of insufficient funds in the respondent's account. Respondent knew at the time that he drew the check that the account did not

[8] Although the list furnished by the Chicago firm reflected, according to its calculations, Wheeler still had in his possession some 391 claim files, *exclusive of* those on which money had been paid, Wheeler turned over to the New Orleans attorneys only about 86 of these. It appears that with one or two exceptions, all of these had been closed, were in litigation, or had prescribed because of Wheeler's failure to take timely action, and were otherwise dead. Wheeler never did turn over to the New Orleans attorneys the 268 files he still had. Further, in checking the 10 to 12 claims presumedly in litigation, the New Orleans attorneys found Wheeler had actually compromised one for $500 without making any report on or remittance in connection with his collection of this amount.

[9] "It was not until the letter of December 19, 1959, was received that the Chicago firm had actual admission that Wheeler had, indeed, recovered money from carriers which he had either failed to remit or even report on—some as far back as 1955. This was the firm's first knowledge with respect to almost all of these collections.

contain sufficient funds to cover the check, but explained that he was ill and did not have the opportunity to transfer funds to that account before it was presented for payment, and agreed to send a certified check to cover the deficiency immediately. When funds to cover the N. S. F. check did not arrive as promised, the Chicago firm dispatched a representative to New Orleans in an attempt to secure the remaining files in respondent's possession and to collect the amounts due on these files which had been settled.

"The representative of the Chicago firm spent January 25th and 26th, 1960, in New Orleans with the respondent, attempting to verify with him the amounts collected for the account of the client which had not been remitted. It was difficult to arrive at any conclusion because the respondent had, by letter dated January 23, 1960, transmitted what he contended were the remaining files in his possession to the Chicago firm, enclosing with his letter listings of the file numbers on which settlements had been made and showing the amounts collected thereon, totalling $6,983.63. *At this time respondent agreed that there was due the client and the Chicago firm $10,064.59*, and upon being pressed paid $2,250.00 in cash *on account, but refused to pay the balance which he admitted was due.* The Chicago firm later learned that the respondent *had not returned a number of additional files in which he had received settlements.* Further efforts on the part of the Chicago firm finally resulted in their securing from the respondent all of the files in his possession.[10] However, up until the commencement of the hearing before the Commissioner, respondent had made no payments on the recoveries *admittedly made by him* except for the cash payment of $2,250.00 delivered to the representative of the Chicago firm in January of 1960. The final amount of $12,492.93 still due by Wheeler and

[10] It appears that even at the time of the hearings there were still some *four* files still missing, for which Wheeler had never accounted.

not accounted for was not paid until May of 1961, as pointed out above in Footnote No. 6, which was after the charges were filed, after the hearings before the committee, and the first hearing before the Commissioner. (The emphasis has been supplied.)

"The respondent does not dispute any of the foregoing facts. He urges, however, that he is not guilty of the charges contained in Specification #1, contending that by returning the files and the lists enclosed with his letters of December 19, 1959. January 23rd and February 13th, 1960, he had reported and accounted for the money which he had collected. He further contended that he had no obligation to remit the funds because as a result of the Chicago firm's demands he had returned the files and had no records by which he could determine the amounts due him for fees and expenses.[11] In this connection, he insisted that it was incumbent upon the Chicago firm to account to him for the amounts which he owed after giving him credit for fees,

[11] In addition to admitting in January 1960 he owed the client and the Chicago firm $10,064.59. Wheeler, on April 23, 1960, significantly wrote the firm to the effect that he would, before the end of the coming week, "*send you a certified check for around five thousand dollars. I will send you the balance due before the end of the month,*" adding this was the first time since he had been practicing law that he had "*ever had serious financial troubles.*" He even admitted that he was "*fully aware of the seriousness of this situation* and the fact that your decision as to your course of action is of crucial importance to me. It seems to me that at this state the best interest of all concerned can best be served by my devoting all of my efforts towards *getting some money into your hands as quickly as possible, and that I am doing.*" No further money was ever sent, however, and only during the hearings before the Commissioner was in excess of $12,000 paid by Wheeler in settlement of the civil suit filed in April of 1961. It seems obvious that the change in Wheeler's attitude from that reflected by this letter and in his appearance in this case is due to the fact that the Chicago firm had, on April 20, 1960, just previous thereto, and apparently unknown to Wheeler, filed its complaint with the Committee on Professional Ethics and Grievances.

court costs and other unliquidated sums which he claimed were due him for telegrams and travel expenses. *Respondent refused at any time to state the amount of these costs or to substantiate that any such sums were due him.* (The emphasis has been supplied.)

"Respondent's attempted explanations for his conduct, in the Commissioner's opinion, are not valid and *evidence a cynical attitude toward his obligation as a lawyer who has come into possession of funds belonging to others.* The undisputed evidence conclusively establishes that for a period of over two years attempts were made to secure an accounting and remittance of the funds which he admitted that he had collected for The Atlantic Companies.[12] * * *.

"Any confusion in this case concerning the amount due respondent for costs out of the recoveries made by him were the direct result of his wilful failure to properly account for the funds which came into his possession. Although in testimony and by brief respondent has suggested to the contrary, the evidence in this case is quite clear that the Chicago firm at all times was entirely willing for the respondent to deduct his fees and reasonable costs from the amounts collected by him for The Atlantic Companies. After refusal for a period of two years to report

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[12] Pointing out that Canon 11 of the Canons of Professional Ethics provides in part that "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client," and, further that "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly * * *," the Commissioner stated it was his opinion this merely expressed "the inherent duty and great responsibility resting upon a lawyer to make a detailed and accurate account of all monies received by him, and to pay sums promptly, less other proper fees and disbursements." He cites In re Novo, 200 La. 833, 9 So. 2d 201; Poulson v. Blanchard, 6 La. App. 101; and 7 C.J.S. Attorney and Client § 133, p. 973.

and account for the monies collected, respondent certainly cannot now validly contend that because he returned the files it became the duty of those who had the files to account to him for his actions.[13]

"No satisfactory explanation was ever offered by the respondent for having drawn the check dated January 14, 1960, on The Whitney National Bank of New Orleans, knowing full well that he had insufficient funds on deposit to cover the check. His explanation for this action was that at the time that he issued the check he was ill and although he intended to, he could not physically transfer funds to this account prior to it being presented for pay-

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[13] Actually, Wheeler had some or all of these files *in his personal possession* during the period from August 1954 to March 1960, a period of *almost six years*, and, in fact, has still been unable to account for four of the files. During almost *three years*, beginning with January of 1957, when the Chicago firm became alarmed and began to thoroughly investigate the status of Wheeler's work, he made no serious effort to account for the monies he now admits were collected by him, but, instead, hindered an accounting with the Chicago firm at almost every step. The record discloses that after Wheeler was written in January 1957 with respect to an accounting or status report, the firm in March following, with positive knowledge he had settled with its authorization a claim in excess of $600, demanded that he remit this money or account for it. He wrote in May he had this money in a "special account" and would send it in two weeks. He never did. It was not until October 1960 that he finally released some 86 files to the New Orleans attorneys, and it was not until December 1959 that he sent the first batch of files to Chicago, thus making it possible for that firm to determine for the first time he had collected on many claims over the years for which he had never accounted. It was only in March 1960 that he finally turned over to the firm all but the four missing files. This was more than three years after the first demand for an accounting in January 1957, during which years he had some or all of the files in his possession and could have, from them, secured the information necessary for an accurate accounting, particularly since he alone knew the amounts expended as costs in connection with the collection of the claims, and for which he claimed during the hearings he was entitled to reimbursement.

ment. Even conceding that illness and intention to transfer funds to an account justify drawing a check knowing that the funds are not then on deposit, the respondent offered no explanation as to why the check *was never made good*.[14] (The emphasis has been supplied.)

"The Commissioner finds that, by his own admissions, the respondent is guilty of the charges contained in Specification #1, with the exception of the charge that he violated his authority in reference to the settlement of claims."

With respect to respondent's violation of his obligations and responsibilities as a fiduciary by commingling with his own and converting to his personal use funds due his client, as set out in Specification No. 2, the Commissioner found that "although the respondent contends that he did in fact segregate the funds belonging to The Atlantic Companies and the Chicago firm, respondent's own testimony requires the conclusion that the committee has also proved this charge. Respondent testified that during the early stages of his relationship with the Chicago firm, the money which

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[14] Respondent's attempted explanation is that the $2,250 he paid the representative of the Chicago firm in his office in New Orleans toward the end of January 1960 was in compromise of the NSF check, but the record fails to substantiate such contention. The NSF check, dated January 14, 1960, was a purported payment of the amount Wheeler admittedly owed as reflected by his letter of December 19, 1959, and the files accompanying it, i.e., $4,991.66, less his and the Chicago firm's fees in connection with this amount. The check had been sent in response to the firm's demand for immediate payment of the amount due and had been returned as NSF at the time the firm sent its representative to New Orleans the latter part of January. After going over the matter, Wheeler at that time admitted he had collected and not accounted for funds in excess of $10,000. It was only after payment of the entire amount was demanded within 24 hours that he paid the $2,250 in cash, presumably the only amount he could then raise. Wheeler told the firm's representative at this time he had sent ALL OF THE FILES to Chicago, but the representative learned upon returning to Chicago Wheeler had still not surrendered or accounted for 158 claim files.

he collected was kept in a 'special account.' He admitted, however, that the special account was not restricted to the funds collected for his client; and, it appears that his 'special account' was not a trust account clearly identified as containing only those funds belonging to others. Inherent in respondent's testimony is the conclusion that he kept no books or records on the funds which he collected for The Atlantic Companies and that he could not possibly identify any specific amount deposited in his 'special account' as representing payment for any particular claims received by him for the account of The Atlantic Companies.

"As a matter of fact, the respondent did not even maintain these funds in his own account subject to his own control. Handling the funds in the manner to which he testified is certainly far more serious than only having failed to maintain them in a proper trust account. He testified that because of his own financial difficulties, late in 1956 he placed cash representing the funds collected by him in his mother-in-law's safety deposit box in The Hibernia National Bank in New Orleans, to which he had no right of entry and over which he had no control. He further testified that prior to his mother-in-law's death in the fall of 1958, he physically transferred the funds to a safety deposit box owned by one Henry J. Burt in a Louisville, Kentucky, bank. Henry J. Burt was reluctantly identified by the respondent as a friend and co-employee of his brother employed by the L. & N. Railroad. The respondent had no personal right of access to this safety deposit box and could not even testify with any particularity concerning the amount in the box or how the funds contained therein were identified. Canon 11 of the Canons of Professional Ethics provides in part that money of a client coming into the lawyer's possession 'shall not under any circumstances be commingled with his own or be used by him.' Even accepting at face value the respondent's im-

probable testimony[15] as to his method of safekeeping the funds, as he is certainly guilty of not only having commingled the funds in violation of the Canon, but he is also guilty of having placed the funds beyond his own control or the control of his client.

"Presumably the respondent was attempting to prove by his testimony that he at no time converted the funds collected to his personal use. However, the Commissioner is of the opinion that the respondent's testimony is not believable since the record clearly shows that because of his own financial difficulties he used the funds and was in no position to replace them until May 16, 1961, during the hearings before the Commissioner.[16] No other conclusion is possible in the light of the respondent's letter to a representative of the Chicago firm, dated April 23, 1960. In this letter respondent admitted that since he had consummated the settlement of several matters which had been pending, he was in a position to 'project' what he could do in connection with payment of the amounts due by him and that he would remit the funds prior to the end of April, 1960," which he never did. "He further recognized that it was to his interest to devote all of his 'efforts' toward getting 'some money' into 'your (the Chicago firm's) hands as quickly as possible • • •.'[17]

"This letter written by the respondent at approximately the time the charges were instituted against him, *was never*

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[15] Respondent produced not one single witness to corroborate his stand in this respect, neither his wife, his brother, his secretary, or Henry J. Burt; and as improbable as his stand was, it was his burden to establish it by clear and convincing evidence and testimony, which he totally failed to do.

[16] This was in settlement of a civil suit instituted in April 1961, and not because of the grave charges brought against him, as pointed out above in Footnote No. 6.

[17] This letter is quoted and discussed more fully in Footnote No. 11.

explained by him and stands as mute evidence that his explanations in justification of his actions occurred to him only after the commencement of these proceedings." (The emphasis has been supplied.)

[10, 11] While we are in full accord with Commissioner's observation in his report that the purpose of disbarment is not punishment but the protection of the courts and the public, we cannot, in good conscience, follow his recommendation that the respondent only be suspended from the practice of law in this state for a period of two years following the finality of this case. The charges of which respondent was found guilty were not only of the most serious nature, reflecting gross professional misconduct and involving, as it did, a sizable amount of money belong to his client and the forwarding law firm, which Wheeler converted to his own use, but his attitude throughout has been one of cynical and utter disregard for his obligations as a lawyer, causing the Commissioner in his report to observe that Wheeler had, by his own testimony, *demonstrated* • • • *he not only failed to recognize the gravity of his actions but attempted to exculpate himself by laying the blame on the shoulders of those persons who were damaged by his improper conduct.*" This is a course of action, we might add, he continued to pursue when the case was argued before us, and even in a supplemental brief filed subsequent thereto. (The emphasis has been supplied.)

For the reasons assigned, it is ordered, adjudged, and decreed that the name of Thomas B. Wheeler, respondent herein, be stricken from the roll of attorneys and that his license to practice law in Louisiana be, and the same is, hereby, cancelled. All costs of this proceeding is to be paid by the respondent, Thomas B. Wheeler.

SANDERS, Justice (concurring in part and dissenting in part).

I fully concur in the conclusion that the respondent attorney has been guilty of professional misconduct that war-

rants disciplinary action. However, the record reflects that this is the first complaint made against him in twenty years of professional service. Restitution has been made. In view of these and the other circumstances of this case, I am of the opinion that suspension of the respondent for a period of two years (as recommended by the Commissioner) is the proper disposition. Such a suspension in the instant case will, in my opinion, achieve the primary objective of all disciplinary proceedings against members of the legal profession: the protection of the courts and the public. No greater penalty should be imposed than that which is required to accomplish this purpose. See In Re Craven, 204 La. 486, 15 So.2d 861 and In Re Novo, 200 La. 833, 9 So.2d 201.

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OFFICE OF THE CLERK
SUPREME COURT OF LOUISIANA
NEW ORLEANS, 12

November 21, 1962

James J. Morrison, Esq.
Attorney at Law
National Bank of Commerce Building
New Orleans

Re: No. 45,533
Louisiana State Bar Association

v.

Thomas B. Wheeler

Dear Mr. Morrison:

This is to advise that the Court today denied your motion for a stay of mandate in the captioned matter with the following notation:

"Motion denied—no Federal question involved."

With kind regards, I am

Cordially yours

V. J. COURVILLE

VJC:n

cc: John Pat Little. Esq.
W. W. Thimmesch, Esq.

Articles of Incorporation of the Louisiana State Bar Association

ARTICLE XIII

Section 9:

"Upon the termination of the hearing, the commissioner shall report to the Supreme Court his findings of fact and conclusions of law. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are, within that period, filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the Court on the summary docket, and on the record prepared before the commissioner. For sufficient cause shown, the court may permit evidence taken before the commissioner to be supplemented by hearing in open Court."

Rules of Supreme Court of Louisiana

Rule XVI

DISBARMENT

All matters touching upon the discipline and disbarment of members of the bar shall be governed by Article XIII of the Articles of Incorporation of the Louisiana State Bar Association adopted as the rules of this court on March 12, 1941.